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JAN 13 2006

OFFICE OF PETITIONS

In re Application of
Eric Bleicken
Application No. 10/669,407
Filed: September 25, 2003
Title: Bow-Facing Rowing System

ON PETITION

This is a decision on the petition filed September 29, 2005, under 37 CFR 1.137(a) to revive the above-identified application.

The petition to revive under 37 CFR § 1.137(a) is **DISMISSED**.
The petition to revive under 37 CFR § 1.137(b) is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR § 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This above-identified application became abandoned for failure to timely file a complete reply to the non-final Office Action of June 15, 2004. A Notice of Non-Compliant Amendment (37 CFR 1.121) was mailed on October 12, 2004 which set an extendable reply period of one month. A reply was received on November 12, 2004. On February 23, 2005 a second Notice of Non-Compliant Amendment (37 CFR 1.121) was mailed. An untimely response was received on April 11, 2005. This application became abandoned on November 13, 2004. A Notice of Abandonment was mailed on July 22, 2005. A petition filed under 37 CFR 1.137(b) was dismissed on August 23, 2005.

Petitioner asserts that his failure to file certain documents in a timely manner resulted from his reliance on alleged inaccurate information provided by USPTO personnel and a USPTO notice that was not received. Specifically petitioner contends he did not receive the February 23, 2005 Notice of Non-Compliant Amendment. Petitioner insists that he spoke to Examiner Avila before mailing his reply to the Office action (received April 7, 2005). After the reply was received petitioner alleges that Examiner Avila stated "the claims looked good and the patent process should be complete in a couple of weeks".

PETITION TO REVIVE UNDER 37 CFR § 1.137(a)

A grantable petition under 37 CFR § 1.137(a) must be accompanied by:

- (1) the required reply,¹
- (2) the petition fee,
- (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable within the meaning of 37 CFR §1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 CFR § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

The showing of record is inadequate to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).² Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, facsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.³

Petitioner's arguments have been considered but they are not persuasive. Petitioner's contention that the delay was unavoidable due to receipt of inaccurate information and failure to receive an Office Communication is not convincing to establish unavoidable delay. A delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered "unavoidable" due to: (A) the applicant's reliance upon oral advice from USPTO employees; or (B) the USPTO's failure to advise the applicant of any deficiency in sufficient time to permit the applicant to take corrective action. See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985).

Petitioner states that he did not receive the February 23, 2005 second Notice of Non-

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

² See MPEP 711(c)(III)(c)(2) for a discussion of the requirements for a showing of unavoidable delay.

³ Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

Compliant Amendment. However, the facts would indicate that petitioner did receive the second Notice, because he purportedly responded to the Notice with the untimely amendment submitted on April 11, 2005. The second Notice of Non-Compliant Amendment clearly stated that the application would be abandoned unless petitioner corrected the deficiency and obtained an extension of time under 37 CFR 1.136 (a). Petitioner's April 11, 2005 response was filed without a request for extension of time and the requisite fee. Accordingly, the application was abandoned.

To the extent the Notice of Non-Compliant Amendment was not received petitioner has failed to provide any evidence. A review of the record indicates no irregularity in the mailing of the Notice, and in the absence of any irregularity in the mailing, there is a strong presumption that the Office action was properly mailed to the address of record. This presumption may be overcome by a showing that the Notice was not in fact received. The showing required to establish the failure to receive an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.⁴ The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Notice of Non-Compliant Amendment may have been lost after receipt rather than a conclusion that the Notice of Non-Compliant Amendment was lost in the mail.

Where applicant is pro se applicant should demonstrate what system is in place upon receipt of communication from the USPTO. If applicant retains documents in a central location, makes use of a computer program or calendar such information as well as any accompanying evidence should be provided on renewed petition. A pro se applicant must state that the file was searched and that the communication in question has not been located. The Office is looking for applicant to make a showing that the communication was not lost after receipt.

Accordingly, petitioner has failed to provide any facts or evidence that warrant a finding of unavoidable delay.

It should also be noted that all correspondence should reference application **10/669,407** and not 10/669,093.

PETITION TO REVIVE UNDER 37 CFR 1.137 (b)

A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by:

- (1) the required reply, unless previously filed;
- (2) the petition fee as set forth in 37 CFR 1.17(m);
- (3) a statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional"; and
- (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c).

Petitioner has failed to provide the petition fee in the amount of \$750.00. The Office is in receipt of the \$500.00. Petitioner needs to supply an additional \$250.00.

Further correspondence with respect to this matter should be addressed as follows:

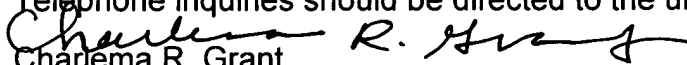
⁴M.P.E.P. § 711.03(c); See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

By mail: Mail Stop Petition
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Telephone inquiries should be directed to the undersigned at (571) 272-3215.


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